

HCEVPREA

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

13 CV 6326 (WHP)

6 PREVEZON HOLDINGS, ET AL,

7 Defendants.

ARGUMENT

8 -----x
9 New York, N.Y.
December 14, 2017
11:36 a.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 JOON H. KIM,
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Southern District of New York

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20 ALSO PRESENT VIA PHONE: DENIS KATSYV
NATALIA VESELNITSKAYA

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(Case called)

THE COURT: This is oral argument on the government's motion to enforce the settlement agreement.

Do you want to be heard, Mr. Monteleoni?

MR. MONTELEONI: Yes, your Honor. Thank you.

May I use the podium?

THE COURT: You may.

MR. MONTELEONI: Thank you, your Honor.

The basis for the government's motion is that the contractual term release in paragraph 4 of the settlement agreement took place on October 10th, when the Netherlands released the AFI Europe debt owed to Prevezon that they had been holding at our request from the restraint imposed in this case; and then, independently, simultaneously, not at our request, not with our encouragement, seized it in connection with their own investigation.

The question is whether that set of actions included a release as paragraph 4 defines it. One thing that this motion is not about is the dictionary definition of the word "release." The government and Prevezon are both using "release" to mean the removal of a restraint. It's really about the context. Which restraint are we talking about? Are we talking about the restraint from this case or all restraints?

THE COURT: What does the process of unfreezing the

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1 AFI Europe debt look like?

2 MR. MONTELEONI: The understanding -- I wasn't
3 there -- is that the way that it was frozen was that the owner
4 of the debt, the debtor, was advised by Dutch law enforcement
5 that this was restrained; and that advice that happened on
6 January 22nd, 2014, from Dutch law enforcement to the debtor,
7 certainly prevented the debtor from actually paying the debt
8 because they were told by local law enforcement that they could
9 not. That advice was made pursuant to our request based on the
10 protective order in the case. The original protective order
11 sort of carried in place when the protective order was narrowed
12 to drop other properties, but it never dropped that debt. So
13 that's been constant through the case.

14 My understanding is that the release from this debt
15 was effected in the exact same way in reverse. They were
16 advised that that restraint was no longer in force. I assume
17 for the new seizure that they were also advised that due to the
18 Netherlands investigation they couldn't continue to pay the
19 debt. So it is sort of an official communication by Dutch law
20 enforcement to the debtor for both the restraint and the
21 release and -- I assume, but I'm not sure -- the new restraint.

22 THE COURT: How can something be simultaneously seized
23 as opposed to seized immediately after lifting the prior
24 restraint?

25 MR. MONTELEONI: The times that they gave were just 1

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1 p.m. Netherlands time, so I don't know if they gave both orders
2 down to the minute. As a practical matter, even if it was like
3 later that day, there wasn't going to be time for the debtor to
4 actually pay. I don't know about that.

5 But what I would say is that there is -- it's not
6 uncommon in the law -- even if it doesn't happen that often
7 sort of in lay life when you're walking down the street -- for
8 someone to be under two forms of restraints simultaneously, and
9 a release can be effected without that person ever moving. If
10 someone is held in a state facility for federal charges or for
11 federal immigration purposes, and then that federal restraint
12 is released, they are still going to be held by the state; but
13 it counts as a release for triggering all kinds of time periods
14 for the new authorities, for relinquishing the responsibility
15 of the original authorities for what happens after that. It's
16 really it's not something that we encounter day-to-day, but in
17 the law it's something that is not really that anomalous.

18 Again, we are looking not at the meaning of the word,
19 but at the context in the settlement agreement. Are we talking
20 about this particular restraint, the only restraint that then
21 existed and the only restraint that the government was
22 obligated to communicate to the Netherlands about at all, or
23 are we talking about that restraint and then any other
24 restraint that might develop in the future subsequent to the
25 signing of this agreement.

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1 So to look at the context, the most basic hornbook way
2 of figuring out the context of a term in a settlement
3 agreement, is to see where else it appears in the settlement
4 agreement. And there's one category of the word "release" that
5 just applies to claims; we don't think that that's really very
6 relevant. If it was, it would probably support our point; but
7 it probably just doesn't matter at all, so we put that aside.
8 We look at the term "release" as it applies to assets.

9 So the first instance is on paragraph 2 where it says:
10 The United States will release the restrained properties.
11 That's talking about the overall purposes of the agreement.

12 So that right there means that we're talking about
13 things that are in the United States's control; we are not
14 promising on behalf of someone else that they will release it
15 from an independent restraint; this is sort of necessarily
16 going to be the actions of the parties, which is, of course,
17 consistent with the background understandings that lawyers have
18 to agreements, that they bind the signatories and the parties
19 in privity with the signatories. They are not going to bind
20 some sovereign nation.

21 So that's paragraph 2, talking about all restrained
22 properties.

23 Then paragraph 3, talking about the release of the AFI
24 Europe debt, is a materially -- almost identical -- phrase to
25 paragraph 4, the release by the government in the Netherlands

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1 of the AFI Europe debt.

2 But in paragraph 3, that phrase, "the release of the
3 AFI Europe debt," is very important in context because
4 paragraph 3 is two sentences. The first sentence says what the
5 government has to inform the government in the Netherlands,
6 that the matter is settled; that we withdraw their request to
7 restrain it; and that we request that they lift the restraint
8 that had been imposed at our request. So the requests that we
9 have to send out is very clearly, very explicitly limited to
10 this one restraint.

11 Then the second sentence, The amended protective order
12 shall be deemed modified to allow the release of AFI Europe
13 debt, doesn't by itself have words of limitation, but by its
14 placement, it's clearly related to the release that was just
15 requested, because it is the only other sentence in the
16 paragraph and it implements -- it allows -- the Dutch to do
17 that release without running afoul of a U.S. court order. We
18 explain, we devoted like two pages in our brief to saying why
19 we think paragraph 3's release is, by its context, even without
20 explicit words, limited to the restraint in this case.

21 Prevezon does not engage with that argument at all.
22 They don't have any argument that they put forward to the Court
23 in their opposition to why they think paragraph 3's release of
24 the AFI Europe debt expands to anything else. There's no way
25 around it because we are just talking about what you modify the

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1 amended protective order to accomplish. And the amended
2 protective order comes from this case.

3 So I think that the first two uses of the word
4 "release" in the settlement agreement are very clearly talking
5 about the narrow sense of the release that the government is
6 requesting, the release that's tied to this case.

7 So then what other use of the word release are there
8 in the settlement agreement? There's just one; there's just
9 paragraph 4. That's the last time that the word "release" is
10 applied to assets in the agreement. It just follows paragraph
11 3, where we're talking about a release that's tied to the
12 restraint in this case, and it uses almost identical language.

13 So I think that the standard, hornbook, black-letter
14 use of "release" in paragraph 2 should be consistent with
15 paragraph 3, should be consistent with paragraph 4, unless
16 there's some countervailing reason why they can't be. Here I
17 think they clearly can be.

18 And then there's a final clue that really confirms
19 that when we are using "release," we are talking about the
20 specific requested release related to this case, which is that
21 paragraph 11, talking about after the release happens, after
22 the payment happens, then the remainder of the settlement
23 agreement has to be essentially discharged. One of the things
24 that happens there is that the court shall order the restrained
25 properties returned to the claimants. So "return" obviously

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1 means this gets to Prevezon's hands in some way. We think that
2 that contrast -- "release" does not mean that it gets to
3 Prevezon's hands by its definition and by context it doesn't.
4 That contrasts with "return," which does have to get to
5 Prevezon's hands.

6 So the government's view is "return" means return
7 every time it happens in the agreement; and "release," every
8 time it occurs in the agreement, means the specific release
9 that is requested here, which is the release related to this
10 case. Prevezon, they don't dispute that in paragraph 2 we are
11 just talking about release by the U.S.; they don't dispute that
12 in paragraph 3 we are just talking about release related to
13 this case; but they say in paragraph 4 "release," same word,
14 shouldn't mean the same thing as paragraph 2 or 3, "release"
15 should mean return, the same thing as in paragraph 11. They
16 want the word "release" in paragraph 4 to be construed
17 different from how it's in paragraph 2 or 3, and the same as
18 the different word "return."

19 So that's really the textual argument, which is we are
20 looking at context using the ordinary tools of contractual
21 construction. We interpret the same words the same and
22 different words different unless there's some reason you can't.
23 Here everything hangs together; everything makes sense; no
24 weird limbo states are created if you just interpret "release"
25 consistently in 2, 3, and 4, and differently from "return" in

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11.

Now, if that alone wasn't enough to make this meaning unambiguous, I think that the drafting history here makes it crystal clear, because this is not a case where this situation was unanticipated, had never been thought of by the parties. There actually were provisions in drafts in 2015 and in 2017, that spoke to this exact situation. They say if the government of the Netherlands should issue an order or statement indicating its intent to continue their restraint of this debt, they are talking about exactly what happens here.

There's two kinds of provisions:

One Prevezon had been requesting from us which we never agreed to, which sort of obligated the government to take some responsibility for the actions of the Netherlands by either saying that the government would obtain it, as if we had control of it, or that we would cooperate with them in getting it out, and Prevezon saying, Well, you can't really tell from the removal of that cooperation language anything about what happens with respect to their obligation to pay.

But there's another set of provisions -- provisions that the government offered and provisions that Prevezon offered -- that were also deleted that Prevezon does not address at all in their brief. Those provisions say that in this event, if the Netherlands seizes the money, if they can't get it, then they can cancel the agreement, right; they can

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1 cancel the agreement, we'll set a trial date. It's bilateral;
2 both sides could cancel the agreement, but this was at
3 Prevezon's request; they were the people who wanted to do it,
4 we just asked for our own ability to cancel it so they couldn't
5 just sort of hold the case in stasis.

6 So that provision was in there. It was in there in
7 2015; it was in there when Michael Hess, their first separate
8 settlement counsel in 2017, asked for us to send the previous
9 offer back to them.

10 We sent them another copy of that offer; it had this
11 paragraph, paragraph 12, which had exactly that language, which
12 would have meant if this precise situation happens, Prevezon
13 can get out of the agreement without paying.

14 They then came back with various types of cooperation
15 language in that event. When we finally decided to make an
16 offer on the eve of trial, we entirely stripped out that
17 provision.

18 If you look at the portion, the red line comparison,
19 in my declaration, this page that I cite to, page 17, shows
20 deleted paragraph 12. You can see there's this like
21 strike-through of the language that would precisely allow
22 Prevezon to get out without paying if this precise situation
23 happens.

24 So if there were ambiguities in the contractual text
25 or structure, it's pretty hard to imagine a clearer piece of

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1 drafting history. Not for nothing, Prevezon just doesn't even
2 respond to this. They claim when they are analyzing the
3 drafting history that the parties' negotiations concerned their
4 obligations to secure the release, not their obligations
5 regarding payment in the event there was no release. That's
6 not accurate.

7 The cancellation provision, which is -- again, we can
8 go see page 17, strike-through from that paragraph would have
9 precisely allowed them to get out without paying in this
10 situation.

11 In 2017, we weren't willing to allow that anymore; we
12 thought that we should have a final agreement that isn't going
13 to have a possible rip cord to void it, and we stripped that
14 out and they signed it. So we think that whether by just
15 talking about their interpretation or claiming that there's no
16 meeting of the minds, we really think that they can't just
17 insert back in a term that we specifically struck through and
18 deleted that basically they signed this deal, they agreed to
19 bear the risk of something that neither of us could control,
20 which is what the government in the Netherlands would do, and
21 what we bargained for is that they would still make their
22 payment if this happened.

23 One thing I should point out about their claim, Well,
24 there was no meeting of the minds, is this is not a situation
25 where neither side had any reason to know about the other

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1 side's meaning. This is not like we say we're going to send
2 you grain on the ship Peerless, we sign the contract, but
3 there's two ships called Peerless; no one even knew about the
4 other Peerless, thinking about the other Peerless ship. We had
5 a provision about exactly what would happen in this exact
6 situation and it got deleted. They agreed to it with that
7 deletion.

8 They also sort of say, Well, this is crazy. This
9 wouldn't be commonsensical that we would agree to it in these
10 circumstances, because it's not good enough for us.

11 Look, they agreed to provisions that they didn't
12 really like because obviously there's a benefit to both sides
13 in avoiding trial.

14 In 2015, we gave them a much steeper discount. They
15 could have gotten out of the case in 2015, before discovery, by
16 paying \$2 million; but that wasn't to their liking. And on the
17 eve of trial, we said \$6 million and no protections in this
18 instance. They swallowed the \$6 million and they swallowed the
19 no protections, because sometimes it's in a party's interest to
20 sign an agreement that assigns them some level of risk because
21 that averts the much greater level of risk at trial.

22 So that's why we believe the contract -- if the
23 contract was just the word "release" standing alone, that would
24 be ambiguous. But taken as a whole, the contract is not
25 ambiguous. As clarified by the drafting history, it's really,

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1 really not ambiguous. So we think that the deal was struck;
2 the deal should be enforced.

3 We also think that they are not entitled to discovery.
4 I didn't plan to add anything to what's in my papers, unless
5 you have any questions about that.

6 THE COURT: All right. Thank you, Mr. Monteleoni.

7 Ms. Gay?

8 MS. GAY: Thank you, your Honor.

9 Thanks for seeing us this morning, verging in the
10 afternoon.

11 Your Honor, we are not here trying to get out of the
12 agreement. I should add parenthetically, I heard from Director
13 Freeh this week. He's been traveling overseas. We did not
14 submit an affidavit from him. But he is more than willing to
15 talk to the Court if the Court is interested or for us to do
16 whatever we need to do. He's overseas another couple of days;
17 he'll be back early next week. If we finally need that, we're
18 happy to present his views which are, very briefly, in accord
19 with ours.

20 He was involved in 2017; he thinks 2015 had nothing to
21 do with it. He also agrees that the language that we are
22 talking about being stripped out was not something that was
23 presented to us and we rejected it. The agreement we sent over
24 never had the language in it in 2017.

25 But more to the point, I think what was really focused

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1 on by Director Freeh and by the government -- I wasn't there
2 and so I'm not going to dwell on this for long -- is I think
3 both sides bore some pain in getting to this settlement. Both
4 sides have now said many times they think it's a good deal for
5 them. I think both sides would like to keep it if they can.

6 It was extremely important to our client that what we
7 stated in this settlement was the amount; that they had nothing
8 to do with Magnitsky's death; that this was not any kind of
9 admission on their part, so there's a lot of language in there
10 about that from paragraphs 5 on. I don't think we need to
11 rehearse that. But that's also something that Director Freeh
12 can address.

13 Putting that aside, the contract is the contract. If
14 there's a suggestion that we are not addressing paragraphs that
15 went before, it is simply because the language that governs our
16 conduct, the government's conduct, and then the Netherlands'
17 conduct, we think, is very much set out here.

18 In terms of, again, what went back and forth in 2017,
19 the language that we are talking about is not language that we
20 submitted in our draft. What we submitted was what we
21 eventually signed. There was definitely wordsmithing. Most of
22 the wordsmithing, your Honor, was around the Magnitsky act and
23 the import to the client, given all that was going on -- who
24 knew at the time how much was going to go on -- that they were
25 not admitting to any guilt here.

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1 With respect to these provisions though, I
2 understand -- and if I am misapprehending this, I am sure
3 Mr. Monteleoni will say -- that what we are arguing about is
4 not that there should be a release, but, one, what the scope of
5 the release was, and whether a release happened. So let me
6 first address those and then I'll get to the language a bit.

7 Your Honor, I think you have a copy of the letter from
8 the Dutch. Should I hand one up? Would that be helpful?

9 THE COURT: If you've got one to hand up, that would
10 be fine.

11 MS. GAY: Your Honor, it's in the record in our reply
12 papers.

13 THE COURT: I didn't bring it with me onto the bench.

14 MS. GAY: Your Honor, what I've handed up is the cover
15 transmittal from the government, from Mr. Monteleoni. He's
16 already made reference to that, the 1 p.m. simultaneous
17 actions. And then what I've given attached to that are the two
18 pages that came to us by email from Mr. Monteleoni. I make
19 reference to the second page, the last full paragraph before
20 "best regards."

21 In the words of the Dutch prosecutor, today we will
22 lift the restraint, as requested by the U.S. authorities, and
23 seize it at the same time. There is no suggestion in here of
24 release of any sort, whether it's our release, which is release
25 totally of the asset, or release as the government defines it.

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1 It's simply a changing of the guards, so to speak.

2 In regard to that, if we look carefully at the
3 paragraphs that have been -- I hope that your Honor hasn't
4 memorized them, but I think probably Mr. Monteleoni and I have,
5 which are paragraphs 3 and 4. I just call to the Court's
6 attention that paragraph 3 states what the government's
7 obligations are here, our government, our United States
8 Government.

9 It says they are obligated to request the government
10 of the Netherlands to continue -- I'm sorry. The government
11 withdraws its request for the government of the Netherlands to
12 continue to restrain the AFI Europe debt, and shall request
13 that the government of the Netherlands lift the restraint.

14 And then it says that our government's amended
15 protective order, our government's amended protective order,
16 shall be deemed modified concerning the release of this debt.
17 These are our obligations.

18 In terms of the use of the word "release," we are
19 talking here about what our government is to do. As far as I
20 can tell, they are going to amend the protective order to say
21 this asset that they reached out and asked the Netherlands to
22 restrain can be exempted from the protective order, and that
23 they are going to ask the government to lift the restraint.

24 In paragraph 4, we are talking about the Netherlands
25 obligations in which it says they are obligated to release --

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1 that the payment shall be made within 15 days of the release by
2 the government of the Netherlands of the AFI Europe debt and
3 shall be made and goes on and on. This deals with an entirely
4 separate obligation by the Netherlands. It's not simply that a
5 restraint be lifted; they are obligated to release the funds.
6 The release never happened even for a nanosecond.

7 THE COURT: How can an obligation be imposed on the
8 Netherlands which was not a party to this agreement?

9 MS. GAY: Your Honor, I think that is a risk our
10 government took. As the Court will recall and one of the
11 reasons we have politely, but, nevertheless, pressed our
12 bad-faith argument here, is that this asset was something that
13 we -- our government -- I say "we," using the United States, my
14 United States, put into Netherlands' hands and said, Please
15 restrain this asset. And then we -- at the same time, we, our
16 United States Government, asked them to release it or lift the
17 restraint. We were actively helping them keep it and not
18 telling us, etc. I think that, of course, undercuts what our
19 government's obligation was to do.

20 THE COURT: Isn't that somewhat speculative when you
21 say that we were actively helping the government of the
22 Netherlands keep it?

23 MS. GAY: Well, you're right, your Honor, I have no
24 ability to do anything but speculate somewhat. I know that the
25 government of the Netherlands told our government very early on

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1 after the settlement was entered into, as this letter
2 indicates, if the Court wants to look at it again, on the first
3 page, the government of the Netherlands outlined what it had
4 done prior with our government's knowledge, that it held on to
5 the request; that it was investigating, etc.

6 As I can only -- I wouldn't say speculate. As I
7 summarize the records that the government has -- our government
8 has provided us here, your Honor, when they reached out to say
9 please lift this restraint, the Netherlands told them they were
10 doing other things. Our government didn't say, Look, we have
11 an agreement where we have a good-faith obligation to ask you
12 to release this; we have a settlement agreement here. Instead
13 there was a proceeding -- and we can't -- beyond what I'm
14 saying to you, Judge, is opaque to me because we haven't seen
15 the correspondence; we've asked for it. We'd like to get it
16 still in terms of our defense to this.

17 There's no suggestion whatsoever that our government
18 said, Look, we made a deal that these assets that we asked you
19 to hold, that you would release. And instead there seems to
20 have been just cooperation which was not revealed to us until
21 after the fact. It frustrates the whole meaning of this
22 paragraph 4, which says that they are -- it doesn't say they
23 have to release it; it says there will be no payment due until
24 it's released. So I don't think that we are binding -- either
25 side was binding, but we are saying there is a condition

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1 precedent to the date of our payment here.

2 Again, keep in mind, your Honor, our assets are still
3 frozen. One of the reasons we can't press any harder, let's
4 just blow this up and have a trial in January or February, is
5 because their assets are frozen. And this was the conduit to
6 payment.

7 THE COURT: Right.

8 But what about the government's suggestion in a
9 footnote in its brief that it would entertain an amendment of
10 the parties' agreement to permit Prevezon to make the payment
11 to the government from assets that have been frozen here other
12 than the AFI Europe debt?

13 MS. GAY: Your Honor, I'm glad you mentioned that. We
14 appreciated the government included that in the footnote.

15 We reached out to the government and made a proposal
16 that three-quarters of the current amount due be pulled from
17 those assets as they are released in the U.S.; and that because
18 we don't think we were the ones who engaged in risky behavior
19 here, we think our U.S. Government did by not fulfilling the
20 essence of what they were obligated to do in paragraph 3, you
21 work with the Dutch government, this is an asset you asked them
22 to restrain, you work with it to get the other 25 percent. We
23 thought that was a perfectly reasonable thing to do,
24 particularly because we feel that we are not the people trying
25 to explode the agreement. My client wants his assets back and

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1 his life to go on. We are not the ones coming here today and
2 saying, Unless there's no meeting of the minds -- and maybe
3 that's what has to happen -- but we'd like and I think the
4 government would like to preserve this deal. But we were not
5 the ones who frustrated the loosening up of this asset first
6 restrained by our government, first requested that it be
7 restrained by our government, in which the whole pivoting of
8 payment is based.

9 And so, yes, we have reached out and tried to find
10 what we thought was an accommodation. It frankly puts a lot of
11 the burden, a lot of the burden, on us, when we don't think we
12 were the wrongdoer here.

13 We are happy to keep talking about that if the Court
14 wants to send us to a magistrate or wherever, because I know my
15 client would like to get his assets unrestrained so he can go
16 on with his life.

17 But, your Honor, there is a serious question of good
18 or bad faith here.

19 THE COURT: Before you get to that, even if the
20 Kingdom of the Netherlands had not simultaneously restrained
21 the debt, wasn't it still incumbent upon your client to enforce
22 the debt and to do so in the Netherlands?

23 MS. GAY: Your Honor, I'm not following you.

24 THE COURT: It's a debt, right? They restrained a
25 debt.

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1 MS. GAY: Essentially a receivable or something like
2 that.

3 THE COURT: Right.

4 So in order to get that debt, you might have to take
5 enforcement action, wouldn't you?

6 MS. GAY: Well, your Honor, as far as I know, our
7 client followed the advice of their counsel in Europe
8 assiduously. The feeling was that nothing could be done on
9 that until this restraint that our government had asked the
10 Dutch to effectuate was lifted. Also, it was assumed that
11 there was going to be a release of that here.

12 Again, given the allegations in this case and given
13 the allegations since this case was resolved swirling around
14 our counsel, among others, no one asked me about this, but I
15 would have been adamant that nothing be done until there was
16 movement here.

17 THE COURT: What's the extent of the U.S. Government's
18 obligation to keep the debt released? In other words, let's
19 assume that when Mr. Monteleoni sent his letter over there, the
20 government in the Netherlands lifted the restraint, the U.S.
21 restraint. And then two months later, someone, whether it's
22 the government of the Netherlands or some other party, sought
23 to impose a restraint. Would that constitute a violation? Was
24 the U.S. Government required to ensure that that debt was
25 released in perpetuity?

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1 MS. GAY: Well, your Honor, I think paragraph 3 fairly
2 lays out the U.S. Government's obligation. And paragraph 4
3 lays out a condition precedent to the payment date.

4 In terms of what the U.S. was obligated to do, I would
5 say two things: One, paragraph 3 just says that they must
6 request that the asset they asked the Dutch to tie up, there's
7 no longer a need to tie it up, number one.

8 And number two, the U.S. has an obligation, as does
9 any party to a civil contract, particularly an important
10 contract such as a government contract, to attempt to not block
11 the effectuation of the agreement.

12 So, for example, when it was learned that there would
13 be -- I think it's very risky behavior by the U.S. Government
14 when it was learned that possibly this was going to be blocked
15 up again, it was incumbent on the U.S. either to tell us that
16 there was a problem with the effectuation of the intent of this
17 contract or to say to the Dutch, We need this release because
18 we made a deal for X number of dollars with the defendant here.
19 That would be, I think -- every party under the law in the
20 cases we cite in our brief has a duty to try to effectuate the
21 intent of the contract. Even if we quibble about the breadth
22 of the release, it is clear that the intention is that this
23 money would be -- this debt would be used, whether it was for
24 money, collateral, whatever the state of the value here, would
25 be usable by our client to make payment and then get everything

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1 released to go on with his life.

2 So, yes, I think they had some obligations that were
3 clearly -- they don't have to commit a crime to have a breach
4 of their duty of good faith in effectuating a contract; but
5 they do have a duty not to impede it. We didn't know about
6 anything. There's no suggestion here that there was a law
7 enforcement reason that we should know. No suggestion. If
8 there is some proof of that, I would certainly invite the Court
9 to look at that carefully *in camera*, because I haven't seen an
10 iota -- even a hint of that so far.

11 I think the right thing to do would be to say, Look,
12 we've got a problem here. We want our money and you want your
13 assets. This asset that is the center of this agreement on
14 which the dating of payment is conditioned upon its release is
15 going to be potentially encumbered. Let's talk about it. That
16 was months ago. Our client is as harmed by this, arguably
17 more, than the government is.

18 So in terms of what we would seek in terms as you've
19 intimated on being able to prove to talk about something beyond
20 speculation, we think we have more than speculation in what
21 we've cited in our papers and our claim of bad faith, but
22 certainly we'd be entitled to some discovery here, either we'd
23 see it or you would see it, as to what our government's work
24 with the Netherlands was during the pendency of this already
25 executed settlement agreement.

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1 There's no question, as I read this contract, your
2 Honor, that there was an intention and an understanding by my
3 client, even though I wasn't settlement counsel, that this debt
4 would be released before payment was due.

5 And I just want to be super clear in case the
6 government is misunderstanding me. We are not looking to do
7 what those old drafts did, which was to give an escape clause
8 if something like this happened. We are looking to get the
9 money to pay the government what we agreed a compromise amount
10 for all of us, and then to release the assets, and to go on
11 with our lives. That's it.

12 But if that's not the case, if this asset is now hung
13 up, it frustrates the entire intent of the agreement. It also
14 results in a double payment, because we owe whatever we owe
15 here on the \$6 million, plus the government of the Netherlands
16 has seized this amount that was to be used, according to this
17 contract, for us to start the payment process here.

18 So we would certainly, Judge, ask for more discovery
19 or ask for discovery.

20 THE COURT: Why is discovery proper at this stage?

21 MS. GAY: Well, because it is an affirmative defense
22 to the claim of breach here, your Honor. We cannot, as you
23 say, do much more than politely -- but sincerely -- suggest
24 that the government frustrated the agreement here and actually
25 engaged in very risky behavior.

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1 If the government believed that this asset was going
2 to be hung up so that the payment date would be in doubt under
3 paragraph 4, they should have come to you four months ago *in*
4 *camera* or something, if they didn't want to tell us about it
5 and said, Look, this asset, where release is conditioned, where
6 the terminology in paragraph 4 is fundamentally different than
7 paragraph 3. Mr. Monteleoni didn't even read the entire
8 paragraph 3 to you.

9 We need to do something. We need to make an
10 arrangement. And we would have been upset, but we would have
11 been willing to talk about it. We still are.

12 THE COURT: All right. Anything further?

13 MS. GAY: I think, your Honor, our papers state the
14 rest of this. If there are additional questions after
15 Mr. Monteleoni speaks, I may ask to address the Court again.

16 Thank you.

17 THE COURT: All right. Thank you, Ms. Gay.

18 MR. MONTELEONI: If I may reply briefly, your Honor.

19 THE COURT: You may.

20 MR. MONTELEONI: Thank you.

21 To respond first to a few factual questions that came
22 up during the Court's questions, first of all, it is correct
23 that if the Netherlands had taken no action but to release the
24 debt, the debtor could still theoretically have refused to pay
25 Prevezon, which would have necessitated Prevezon to seek

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1 enforcement action of a contractual nature against the debtor
2 in the Netherlands. I'm not saying that there's any particular
3 reason to think that they would have refused to pay, but
4 theoretically --

5 THE COURT: Bidders sometimes do, right?

6 MR. MONTELEONI: I think that that's true. I can't
7 say one way or another. I think that they had been in the
8 final stages of discussing possibly paying Prevezon before law
9 enforcement stepped in; but it's entirely possible that over
10 the passage of time or that the final T's hadn't been crossed,
11 that they would not pay. Certainly there's nothing legally in
12 the contract that would require payment to happen, either
13 simultaneously or even within 15 business days, of the
14 Netherlands releasing the funds. That's the first point.

15 Regarding Prevezon's request to settle for 75 percent
16 of the settlement amount from the restrained assets, when we
17 responded to them, we said, again, we would explore releasing
18 the funds from the restrained assets; but we didn't settle the
19 case for 75 percent of the \$6 million, we settled it for 100
20 percent of the \$6 million. That's what the contract provides
21 and that's what should be enforced. If the Court were to enter
22 an order enforcing it, we would certainly work with Prevezon on
23 a solution to their liquidity, just it didn't change the
24 economics of how much they were paying.

25 Regarding the good-faith argument, it's not just that

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1 Prevezon is sort of speculating. There is evidence in the
2 record. I've submitted two declarations under payment of
3 perjury. My supervisor, Alex Wilson, submitted a declaration
4 under payment of perjury. That's the evidence of what
5 happened. Further discovery wouldn't change the substance of
6 that either. It would just sort of inquire into other matters
7 which are probably privileged and don't go to the substance.

8 The substance is -- defense counsel said, We should
9 have informed the Netherlands that we had an agreement. We did
10 inform them that we had an agreement. We say that in the
11 declarations. They knew we had an agreement; they knew what we
12 were asking for. Indeed, when I met with them in July, as I
13 put in the declaration, we asked again; we asked for them to do
14 this on an expedited basis.

15 The idea that we sort of -- look, we didn't
16 halfheartedly ask; we didn't ask and say, Oh, but we didn't
17 mean it. We asked, we asked again, and at no time did we do
18 something -- did we say that we wanted them to do anything that
19 would impede the flow of funds to the Netherlands -- to
20 Prevezon.

21 What we did do is when they requested factual
22 information, we provided them factual information, as is a very
23 common exercise of our law enforcement responsibilities. We
24 did not disclose the pendency of their investigation of those
25 facts, which might have constituted some sort of obstruction of

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1 justice in the Netherlands, which might have jeopardized -- we
2 just don't know one way or another whether there were aspects
3 of their investigation that -- which is a criminal
4 investigation, that could have been justified by the disclosure
5 of it.

6 The idea of seeking some type of relief from the Court
7 *in camera* just didn't occur to us; but we don't really
8 understand what we would have been asking the Court to do or
9 how the Court could have taken action *in camera*.

10 What the evidence shows is that our requests, which
11 defense counsel is very right, we specified carefully what our
12 obligations were, and we fully discharged them. We let the
13 government of the Netherlands know that that was our request,
14 that we meant it. And we also provided information of a form
15 that we would often provide in a number of circumstances, of a
16 form that expressly steered clear of the things that we had
17 explicitly promised not to provide in the confidentiality
18 order.

19 Our communications with foreign governments about this
20 case, it's not just sort of a gray area; they are actually we
21 did carve out some things that we did promise not to tell
22 foreign governments in the confidentiality order explicitly.
23 We didn't tell them those things. We told them unrestricted
24 information.

25 So to find that there's even a *prima facie* case of a

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1 breach, which is a necessary prerequisite for discovery, the
2 final few cases that we cite indicate you can't just in the
3 post-judgment context get discovery just because you want it;
4 you need to show a *prima facie* case that there is a factual
5 predicate for it.

6 Here, what we have is sworn evidence that shows the
7 opposite of it and no indication that anything happened other
8 than what that sworn evidence said. What that sworn evidence
9 says is the things that we promised to do in the settlement
10 agreement we did. The other things that we did were not things
11 that we didn't promise to do; they were things that we often
12 do. It would be an expansion of the covenant of good faith and
13 fair dealing that is contrary to the covenant law to impose
14 such a term into the contracts, to impose some unspoken duty
15 for a contracting party not to provide truthful information to
16 law enforcement that not only isn't what the law provides, but
17 the perverse consequences are obvious for what that could be,
18 especially because as judicially created and implicit, it would
19 have a vast chilling effect.

20 So we really think that there is no factual predicate
21 for further inquiry on that.

22 Beyond that, we'd rest on our papers.

23 THE COURT: All right. Thank you.

24 Anything further, Ms. Gay?

25 MS. GAY: Yes, your Honor. Thank you.

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1 First, as I've said before, having come into a case
2 that was hard-fought for 1,000 years, it feels like, I realize
3 that sometimes rhetoric gets heated on both sides.

4 Let me just try to make clear for the record, we are
5 not -- we were not, in reaching out to the government between
6 the last time we were here and now, trying to get a discount on
7 the dollar. We weren't trying to get out of this agreement.
8 My client cannot afford a trial. His assets are frozen.

9 So what we were trying to do was to find a way out.
10 We thought honorably because we think we did not put this mess
11 into play. And we do think the government did, and I'll try to
12 make a *prima facie* case with my hands tied behind my back in
13 just a moment.

14 But with regard to that, we said, Here's the U.S.
15 assets. Most of them have been liquidated now; I think there's
16 one property remaining. Let's agree to release those. You
17 take 75 percent of the value of what we've agreed to, whatever
18 the amount is, almost \$6 million. You take that. And then
19 because this mess has been created in the Netherlands, you work
20 with us, and we will help you. We are powerless compared to
21 the two governments. This is an asset you ask the government
22 to restrain; you clearly think it has some value or you
23 wouldn't have asked it to be restrained. We clearly think it
24 has some value because we made the settlement agreement pivot
25 upon its release. With regard to that, work with the Dutch --

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1 who would have never had this in the first place without you
2 asking them to take it -- to get your remaining 25 percent.

3 We thought that was reasonable. If there's some
4 back-and-forth around the edges, we are happy to talk about it.
5 We are not looking to get out of the agreement; we are not
6 looking for a discount. So I don't want that to be a
7 suggestion that could be a confusion. I want that on the
8 record.

9 In terms of the value of this asset, this debt in the
10 AFI, I think both sides are speculating, your Honor, in
11 terms -- or at least the lawyers. My client clearly thinks it
12 has value and wanted to pivot off of it for payment. I know
13 that my client is constrained for funds. I'd be happy to show
14 *in camera* why I know concerning our own bills.

15 But putting that aside, in terms of the government's
16 bad faith here, I think, as the Court knows -- I was a
17 prosecutor; I wouldn't make these allegations lightly; I'm
18 trying to make them delicately now. But what we see from the
19 two declarations the government has submitted, at least
20 according to my notes, is that only nine days after this
21 settlement happened our government began to work with the Dutch
22 government -- and I don't know to what extent, your Honor, I do
23 not know -- in what would essentially become a complete
24 frustration of paragraph 4. Even the Dutch don't say it's a
25 release; they just say we've done this simultaneous taking. I

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1 think they are very careful in not saying it is a release. I'd
2 be interested to understand why that's the case as well.

3 But, as I've said, the case law we've cited to the
4 Court -- the Court is a diligent scholar, as its clerks are. I
5 don't need to read these cases for you. But we've cited a case
6 from the Eastern District, *Dunkin' Donuts* -- it cites various
7 other cases -- that doesn't suggest that there has to be
8 illegal or impermissible conduct.

9 And, of course, your Honor, law enforcement needs to
10 work with other governments; of course, your Honor, there may
11 be concerns about secrecy. There's a protective order in this
12 case. The bench has been approached in various -- not just
13 your Honor, but Judge Griesa. There have been a number of
14 confidential issues in this case that have been explored. It's
15 a delicate situation, there's no question.

16 But without telling us, the government worked in
17 secrecy, without suggesting that there was a reason for it.
18 What we are hearing now, I think, is only speculation about
19 whether there might be some law enforcement objective here.
20 We're talking about a restrained asset.

21 The standard is not that the government just stood
22 back and didn't advocate for what the Dutch were doing. But
23 for months while my client was -- his hands were still tied,
24 this transfer, getting ready for the transfer of this asset, as
25 the Netherlands letter suggests, they held the request in

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1 abeyance, they waited til they could do it at the same time.
2 We were told nothing. I think that's very risky behavior to
3 then come in and suggest that the contract was perfectly
4 fulfilled.

5 The government frustrated what we thought was their
6 good-faith effort to have that asset released. There's no
7 question. And the government did not tell us about it for a
8 significant length of time.

9 We want out of this. We want our money back. But I
10 would say, Judge, there's no question there's been no release
11 here that triggers payment due at this moment.

12 Thank you.

13 THE COURT: All right.

14 Counsel, thank you all for your arguments.

15 Decision on the motion is reserved.

16 Have a good holiday.

17 MS. GAY: You too, your Honor.

18 * * *